

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF CAMDEN

TERESITA CAREY, by and through her :
guardian, Jim Carey, :

KAREN COLLETTI, by and through her :
guardian, Vito Colletti, :

CONSTANCE DANIELS, by and through :
her guardian, Elvera Daniels :

LAURA GORDON, by and through :
her guardian, Muriel Gordon, :

DEBRA HAMILTON, by and through :
her guardian, Marilyn Hamilton :

PATRICIA IADICOLA, by and through :
her guardian, Mary Iadicola, :

BARBARA STEWARD, by and through :
her guardian, Marion Baldwin, :

Plaintiffs, :

v. :

CHRISTOPHER CHRISTIE, as :
Governor of the State of New Jersey; :
NEW JERSEY DEPARTMENT OF :
HUMAN SERVICES; JENNIFER :
VELEZ, as Commissioner of the New :
Jersey Department of Human Services; :
NEW JERSEY DEPARTMENT OF :
HUMAN SERVICES DIVISION OF :
DEVELOPMENTAL DISABILITIES; :
DAWN APGAR, as Deputy Commissioner/ :
Acting Assistant Commissioner :
of New Jersey Department of Human :
Services Division of Developmental :
Disabilities; VINELAND :
DEVELOPMENTAL CENTER; and :
ELOISE HAWKINS, as Chief :
Executive Officer of the Vineland :
Developmental Center, :

Defendants. :

CIV. NO.: 1:12-cv-02522

AMENDED COMPLAINT
[DEMAND FOR JURY TRIAL]

January 11, 2013

AMENDED COMPLAINT

The Plaintiffs, **TERESITA CAREY**, by and through her guardian, Jim Carey, **KAREN COLLETTI**, by and through her guardian, Vito Colletti, **CONSTANCE DANIELS**, by and through her guardian, Elvera Daniels, **LAURA GORDON**, by and through her guardian, Muriel Gordon, **DEBRA HAMILTON**, by and through her guardian, Marilyn Hamilton, **PATRICIA IADICOLA**, by and through her guardian, Mary Iadicola, **BARBARA STEWARD**, by and through her guardian, Marion Baldwin, by their undersigned attorneys, aver the following:

JURISDICTION

1. This action is for declaratory and injunctive relief under the Americans with Disabilities Act (“ADA”), 42U.S.C. § 12132, the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (“Section 504”), the Medical Assistance Program authorized by 42 U.S.C. 1396, et seq., and the United States Constitution.

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1342, and 1343. Plaintiffs’ claims for declaratory and injunctive relief are authorized under 28 U.S.C. §§ 2201-02 and 42 U.S.C. § 1983 and the waiver of state sovereign immunity enacted in 42 U.S.C. § 2000d-7(a)(I) and various Medicaid federal statutes and regulations incorporated into New Jersey law. At all times relevant to this action, Defendants have acted under color of state law.

VENUE

3. Venue lies in the District of New Jersey pursuant to 28 U.S.C. § 1391(b), and in the Camden Division, because the Defendants officially reside in Cumberland County, New Jersey.

NAMED PLAINTIFFS

4. TERESITA CAREY is a 71 year old woman with intellectual disabilities who resides at the Vineland Development Center in Vineland, New Jersey. Teresita brings this lawsuit by and through her brother and legal guardian, Jim Carey.

5. KAREN COLLETTI is a 56 year old woman with mental retardation who lives in Jones Cottage at Vineland Development Center in Vineland, New Jersey. Karen brings this lawsuit by and through her father and legal guardian, Vito Colletti.

6. CONSTANCE DANIELS is a 54 year old woman with intellectual disabilities who resides at Vineland Development Center in Vineland, New Jersey. Constance brings this lawsuit by and through her mother and legal guardian, Elvera Daniels.

7. LAURA GORDON is a 51 year old woman with mental retardation who lives in Jones Cottage at Vineland Development Center in Vineland, New Jersey. Laura brings this lawsuit by and through her mother and legal guardian, Muriel Gordon.

8. DEBRA HAMILTON is a 53 year old woman with mental retardation who lives in Kimble Cottage at the Vineland Development Center in Vineland, New Jersey. Debra brings this lawsuit by and through her mother and legal guardian, Marilyn Hamilton.

9. PATRICIA IADICOLA is a 53 year old woman with mental retardation who lives in Kimble Cottage at Vineland Development Center in Vineland, New Jersey. Patricia brings this lawsuit by and through her mother and legal guardian, Mary Iadicola.

10. BARBARA STEWARD is a 74 year old woman with mental retardation who resides at Vineland Development Center in Vineland, New Jersey. Barbara brings this lawsuit by and through her cousin and legal guardian Marion Baldwin.

DEFENDANTS

11. Defendant CHRISTOPHER CHRISTIE is the Governor of the State of New Jersey. Governor Christie is sued in his official capacity only.

12. Defendant NEW JERSEY DEPARTMENT OF HUMAN SERVICES (“DHS”) is a public entity covered by Title II of the Americans with Disabilities Act 42 U.S.C. § 12131(1). It receives federal funds under § 504 of the Rehabilitation Act, 29 U.S.C. § 794. DHS administers services for more than one million of New Jersey’s citizens, including individuals and families with low incomes; people with mental illnesses, developmental disabilities, or late-onset disabilities; people who are blind, visually impaired, deaf, hard of hearing, or deaf-blind; parents needing child care services, child support and healthcare for children; and families with catastrophic medical expenses for their children. DHS is the largest agency in New Jersey. DHS operates eight divisions including the Division of Developmental Disabilities.

13. Defendant JENNIFER VELEZ is the Commissioner of the New Jersey Department of Human Services (“DHS”). Ms. Velez is sued in her official capacity. Defendant Velez is ultimately responsible for ensuring that New Jersey operates its delivery of services to individuals with disabilities in conformity with the United States Constitution, the ADA, the ADA implementing regulations, section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. § 794(a), and section 504’s implementing regulations.

14. Defendant NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF DEVELOPMENTAL DISABILITIES (“DDD”) is a public entity covered by Title II of the Americans with Disabilities Act 42 U.S.C. § 12131(1). It receives federal funds under § 504 of the Rehabilitation Act, 29 U.S.C. § 794. DDD funds services and supports for eligible New

Jersey residents with developmental disabilities. The division was created in response to the need for better and more effective services for state residents with developmental disabilities.

15. Defendant DAWN APGAR is Deputy Commissioner/Acting Assistant Commissioner of the New Jersey Department of Human Services Division of Developmental Disabilities. Ms. Apgar is sued in her official capacity. Defendant Apgar operates New Jersey's system of services to individuals with developmental disabilities and is ultimately responsible for ensuring that eligible New Jersey residents with developmental disabilities receive services and supports effectively and in accordance with the United States Constitution, the ADA, the ADA implementing regulations, section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. § 794(a), and section 504's implementing regulations.

16. Defendant VINELAND DEVELOPMENTAL CENTER is a residential facility that provides, among other things, habilitation, behavioral, and medical services and supports for women with developmental disabilities. It had two campuses: the East Campus, on Landis Avenue, and the West Campus, on Almond Road, in Vineland, Cumberland County, New Jersey. The Vineland Developmental Center is a public entity covered by Title II of the Americans with Disabilities Act 42 U.S.C. § 12131(1). It receives federal funds under § 504 of the Rehabilitation Act, 29 U.S.C. § 794.

17. Defendant ELOISE HAWKINS is the Chief Executive Officer of the Vineland Developmental Center. Ms. Hawkins is sued in her official capacity. Ms. Hawkins is responsible for the daily administration of Vineland Developmental Center. At the Vineland Developmental Center, she is the administrative supervisor for all treating professionals who serve Plaintiffs.

CLASS ACTION ALLEGATIONS

18. Pursuant to Fed. R. Civ. P. 23(a) and (b)(2), the Named Plaintiffs bring this action on behalf of themselves and all other persons similarly situated.

19. Plaintiffs bring this action pursuant to the Civil Rights Act, 42 USC § 1983; the Americans with Disabilities Act, 42 USC § 12132; § 504 of the Rehabilitation Act, 29 USC § 794 (“Section 504”), and the waiver of state sovereign immunity enacted in 42 USC § 2000d-7(a)(1), various Medicaid federal statutes, and regulations incorporated into New Jersey law and the United States Constitution, on behalf of a Class consisting of themselves and all other persons who are residents of the Vineland Developmental Center, Cumberland County, New Jersey, as of April 25, 2010.

20. The proposed class consists of: New Jersey residents who reside or resided at the Vineland Developmental Center, at anytime since April 25, 2010, or at any time during this litigation.

21. Joinder of the entire Class is impracticable because the Class Members are numerous, and are persons with severe or profound developmental disabilities. Virtually all Class Members are unable to give their consent except through guardians or family members.

22. Plaintiffs’ claims are typical of the claims asserted on behalf of the Class.

23. Plaintiffs do not have any interests that are adverse or antagonistic to any claims or potential claims of the Class.

24. Plaintiffs will fairly and adequately protect the interests of the members of the Class.

25. Plaintiffs are committed to the vigorous prosecution of this action and have retained counsel competent and experienced in this type of litigation.

26. Plaintiffs do not seek monetary damages. Hence, the burden and expense of prosecuting this litigation makes it unlikely that members of the Class would or could prosecute individual actions. If individual actions were pursued by Class Members, prosecution of those individual claims would be impracticable and inefficient.

27. Plaintiffs are not aware of any other pending litigation concerning the claims herein.

28. This Court is the most appropriate forum for adjudicating the claims at issue, which arise under federal law.

29. Plaintiffs do not anticipate any difficulty in the management of this action as a class action.

30. There are many questions of law and fact common to the Class, which predominate over any questions which may affect individual members. The predominant common questions of law and fact include, among others:

- (a) Whether Defendants are liable for violation of the Civil Rights Act, 42 U.S.C. § 1983;
- (b) Whether Defendants are liable for violation of the Americans with Disabilities Act, 42 U.S.C. § 12132;
- (c) Whether Defendants are liable for violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (“Section 504”), and the waiver of state sovereign immunity enacted in 42 U.S.C. § 2000d-7(a)(1);
- (d) Whether Defendants are liable for violation of various Medicaid federal statutes and regulations incorporated into New Jersey law;

(e) Whether Defendants are liable for violations of the United States Constitution; and

(f) Whether named Plaintiffs and Class Members are entitled to equitable and injunctive relief.

31. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy.

32. Plaintiffs seek declaratory and injunctive relief, attorneys' fees and expenses as permitted by law, on behalf of themselves and the Class.

COMMON FACTUAL ALLEGATIONS.

33. All Plaintiffs reside at the Vineland Developmental Center or resided there as of April 25, 2010.

34. All of the residents of Vineland Developmental Center are females. Almost all of Vineland's residents have lived in their homes at the Vineland Developmental Center for many years, with 68 percent of those residents having lived there for more than 30 years.

35. The Vineland Developmental Center is an Intermediate Care Facility for Individuals with Intellectual Disabilities that is operated by the State of New Jersey. It is licensed to serve 556 residents, and currently serves approximately 347 individuals.

36. An Intermediate Care Facility for Individuals with Intellectual Disabilities ("ICF/IID") (formerly referred to as an Intermediate Care Facility for the Mentally Retarded or "ICF/MR") is regulated by the Centers for Medicare and Medicaid Services ("CMS") in conjunction with the state's licensing agency. Part of that regulatory process includes routine surveys by CMS and the state's licensing agency to ensure quality treatment and services are provided by ICF/IID-certified facilities, like Vineland Developmental Center.

37. Eligibility for residence in a New Jersey developmental center is defined by Section 1.3 of Division Circular #3, N.J.A.C. 10:46-1.3, effective March 24, 2011. That regulation defines the developmental disability that must be present in order to receive services as a severe, chronic disability of an individual, which is attributable to a mental impairment, physical impairment, or combination of both; is manifested before age 22; is likely to continue indefinitely; results in a combination of functional limitations in major life activities; reflects the need for a combination of special interdisciplinary care or treatment of lifelong or extended duration; and includes, but is not limited to, developmental disabilities, autism, cerebral palsy, epilepsy, spina bifida, and other neurological impairments.

38. All Plaintiffs are diagnosed as in need of state-run ICF/IID institutional care and have been appropriately designated as eligible for state-operated ICF/IID-level of care.

39. Eighty-six (86) percent of the individuals residing at the Vineland Developmental Center have been diagnosed with profound or severe intellectual disabilities. Approximately thirteen (13) percent of individuals residing at the Vineland Developmental Center have been assessed with a diagnosis of mild or moderate levels of intellectual disability. Almost all individuals residing at the Vineland Developmental Center (hereinafter referred to as “Vineland” or “VDC”) have been diagnosed with additional disabilities, including: Sixty-five (65) percent of the population diagnosed with seizure disorders, seventeen (17) percent diagnosed with autism, and twenty-eight (28) percent diagnosed with cerebral palsy. In addition, forty-six (46) percent have vision difficulties, and twelve (12) percent have hearing impairments.

40. The primary service needs of individuals at Vineland require a variety of services and supports. Some broad areas of service are described below, along with the number of individuals for whom that service is their primary need:

- (a) Extensive Personal Care - Approximately three hundred (300) VDC individuals require extensive personal care. This need refers to people who require total assistance and care provided by direct service staff who are specially trained on individualized programs developed by residents' treating professionals, including physicians, nurses, physical therapists, occupational therapists, speech language pathologists, and many other licensed clinicians who treat residents at the Center.
- (b) Significant Health Care Services - Treating professionals at Vineland have determined that significant nursing intervention and monitoring are required to effectively treat about seventy (70) Vineland residents, who have significant health care needs. This service includes the need for 24-hour monitoring and immediate availability of treating professionals for intermittent pressure breathing, inhalation assistive devices, tracheotomy care, or treatment for recurrent pneumonias or apnea.
- (c) Ambulation - Approximately thirty-seven (37) percent of Vineland residents are non-ambulatory or require assistance with ambulation.
- (d) Significant Behavioral Support - Approximately sixty-three (63) individuals residing at Vineland require significant behavioral support. This need addresses individuals who have behaviors that require intervention for the safety of themselves or others, as developed by psychologists and medical personnel and implemented in conjunction with direct service staff.

41. Prior to 2010, all Vineland residents were consistently evaluated by their treating professionals and determined to be in need of ICF/IID services and that the best setting for Plaintiffs to receive those services was at the Vineland Developmental Center. Subsequent to Defendants' announcement of an intent to close the Vineland Developmental Center, treating professionals often have routinely and inappropriately stated that Plaintiffs would best be served in alternative settings, including settings that do not provide ICF/IID-level of care. Most of these statements supporting placement in the "community" were not based upon sound and unbiased professional judgments consistent with accepted professional standards.

42. For a significant period of time from 2010 to 2012, the Defendants openly stated their intent to close Vineland, and in fact greatly downsized Vineland by closing one (1) of its two (2) campuses. Even though the official focus appears to have shifted to the closure of two (2) other developmental centers, North Jersey Developmental Center and Woodbridge Developmental Center, the treating professionals at Vineland continue to make routine and inappropriate recommendations for placements outside of Vineland due to the illegal and unsound policies and practices of the Defendants encouraging the downsizing or closure of developmental centers.

43. All Plaintiffs have the right to receive ICF/IID-level of services from the State of New Jersey.

44. All Plaintiffs have had or imminently will have their rights to receive ICF/IID-level services at the Vineland Developmental Center denied. The policies and practices of the State will deceive, frighten, and coerce residents of Vineland into inappropriately surrendering their rights to receive this superior level of care. Also, the loss of professionals and other staff at Vineland, due to a perceived lack of job security, and the loss of some services at Vineland due

to its downsizing and the underlying plan to close all Developmental Centers, will result in inferior care in violation of Plaintiffs' rights and will ultimately inappropriately force residents to leave Vineland.

45. Defendants seek to compel Plaintiffs' discharge from Vineland Developmental Center to other settings, including non-ICF/IID-certified settings. The decision to not officially target Vineland for closure at this time, while two (2) other Developmental Centers are officially targeted, does not stop the overall statewide effort to downsize and close all the Developmental Centers. The State will continue to inappropriately, unfairly, and illegally downsize the current Vineland population to make room for residents from facilities that are targeted immediately for closure and to eventually close Vineland. The State has not given any promise for how long Vineland will remain open, which betrays their true intent in the longer term.

46. Defendants' policies and procedures have interfered with or usurped the ability of Plaintiffs' treating professionals to make independent and sound professional judgments. The treating professionals are now often following a political or administrative agenda rather than accepted professional standards.

47. Defendants' policies and procedures have unduly influenced or compelled Plaintiffs' treating professionals to recommend transfer or discharge of Plaintiffs to settings that are not the most appropriate for Plaintiffs' needs, solely for the purpose of conforming to Defendants' political policy decisions.

48. All Plaintiffs are medically and developmentally most appropriately served at the Vineland Developmental Center instead of any alternative setting.

49. All Plaintiffs are physically, mentally, and emotionally fragile and are most appropriately served at the Vineland Developmental Center instead of any alternative setting.

50. All Plaintiffs are in need of continuous care by multidisciplinary teams of professionals as are currently serving them at the Vineland Developmental Center.

51. The services provided to Plaintiffs cannot be reasonably replicated in alternative residential settings.

52. Non-ICF/IID-certified settings are not able to reasonably provide the same level of care as an ICF/IID-certified facility.

53. Services provided to residents at the Vineland Developmental Center are uniquely tailored to the needs of the residents of that Center.

54. None of the Plaintiffs have given informed consent for their discharge from Vineland Developmental Center because, among other things, Defendants have precluded treating professionals at the Vineland Developmental Center from fully and fairly considering whether Vineland best meets the needs of the Plaintiffs, and have prevented those treating professionals from acknowledging the rights of Plaintiffs to receive treatment and services at Vineland Developmental Center or in another ICF/IID.

55. Plaintiffs have not had the benefit of their respective treating professionals' independent judgment about whether they should continue to reside at Vineland Developmental Center or at another state-operated ICF/IID.

56. Defendants have or will unduly influence or compel Plaintiffs to receive services in non-ICF/IID facilities. Those services are inferior to the services provided at Vineland Developmental Center because, among other reasons, they will not be provided by an individualized, multidisciplinary team of professionals.

57. Persons residing in the type of settings to which Defendants intend to discharge Plaintiffs, are at approximately seventy-five (75) percent greater risk of death, abuse, and neglect

as compared to similar persons receiving services at a facility like Vineland Developmental Center.

58. Defendants know or should know of the increased danger of death, abuse, and neglect to which Plaintiffs will be subjected if they are discharged from Vineland, as sought by Defendants' political plan to downsize or close all the Developmental Centers.

59. Persons residing in the type of "community" settings to which Defendants intend to discharge Plaintiffs are likely to be more secluded from the community immediately surrounding them and be more restricted in their interactions with non-disabled peers as compared to similar persons receiving services at a facility like Vineland Developmental Center.

60. In May 2011, Defendants announced their plan to "depopulate" and close the Vineland Developmental Center and discharge residents to non-ICF-IID-certified alternative settings. The plan was to move the residents to "community" settings such as small group homes, nursing homes, and other settings with smaller populations where they would allegedly have more interactions with the non-disabled population. In reality, these residents may actually be more isolated in a small home or apartment than they were at Vineland, as Vineland is open to community events and has opportunities for community involvement.

61. Among the reasons identified by Defendants for their "depopulation" plan was the ostensibly high cost of providing the necessary services for the disabled residents of the State's developmental centers.

62. As part of that plan, Defendants also announced that they would close the West Campus of the Vineland Developmental Center. Defendants have taken significant steps in that plan, including the closing of the West Campus. The Defendants have transferred and discharged residents without adequate transition plans, without guardian or residents' full and

fair participation, without treating professionals' independent and sound assessments, without regard for residents' specific individual needs and desires, and without regard for the rights of residents. Because of continuing arbitrary and inappropriate recommendations by treating professionals that residents of Vineland can be and should be served in the "community," the remaining residents remain at great risk of being improperly and detrimentally transferred out of Vineland.

63. The identity and circumstances of all adversely impacted former and current residents can only be obtained through appropriate discovery in this case, including the names and contact information of all members of the proposed class.

64. Contrary to Defendants' public statements about the alleged general desire for "community" placements, Plaintiffs have not requested discharge or transition from Vineland Developmental Center.

65. Defendants have instructed or inappropriately encouraged Plaintiffs' treating professionals to include language in Plaintiffs' individual habilitation plans indicating that Plaintiffs are capable of being served in settings other than Vineland Developmental Center, regardless of whether Plaintiffs are actually capable of being served in alternative settings.

66. Defendants have instructed or inappropriately encouraged Plaintiffs' treating professionals to include language in Plaintiffs' individual habilitation plans indicating that Plaintiffs have requested discharge to settings other than Vineland Developmental Center, regardless of whether Plaintiffs actually communicated such a request.

67. These treating professionals are likely intimidated and fearful of retaliation, including the possible loss of their jobs, and likely will only be forthcoming with information to

support the position of Plaintiffs if protected by or compelled by appropriate discovery in this case.

68. Because Plaintiffs' treating professionals have not been able to provide independent judgments about Plaintiffs' ability to be comparatively served in alternative settings, the judgments they have made in that regard are largely unreliable and inaccurate.

69. Many of the Plaintiffs have not been provided sufficient information to allow them to provide informed consent to discharge.

70. Defendants made the decision to downsize or depopulate the Vineland Developmental Center without regard to the needs of the individual Plaintiffs, their individual support plans (which are developed in conjunction with their treating professionals), or their rights to receive services in the least restrictive setting appropriate to their needs.

71. On December 14, 2011, the New Jersey Legislature enacted a statute which included the creation of a task force to evaluate the state's seven developmental centers and to issue binding and non-binding recommendations to the Department of Human Services ("DHS") with respect to closure of one or more of the centers. Senate No. 2928, Chapter 143 P.L. 2011.

72. On August 1, 2012, the "Task Force on the Closure of State Developmental Centers" ("task force") issued a "Final Report As Submitted to Governor Chris Christie and the New Jersey Legislature" ("Final Report").

73. The Task Force's allegedly binding recommendation as contained in the Final Report instructed DHS "to develop and implement a plan to close North Jersey Developmental Center followed by Woodbridge Developmental Center within the next five years" *Id.* at 8.

74. While the Final Report contains language regarding the needs of the residents, such language is largely rendered meaningless by the Task Force's presumption that the two

facilities must be closed, and that residents must be discharged to achieve its binding recommendation and to achieve the political agenda of the State. Similarly, although Vineland is not an official and immediate target for closure, there is an underlying presumption by the State, as evidenced by its policies and practices, that Vineland must ultimately close. The needs of the residents of Vineland should be the primary concern of the State, but instead the State gives priority to its political agenda.

75. The Task Force's recommendations and the State's actions to discharge residents to comply with the recommendations of closure elude meaningful evaluation and consideration of treatment team professionals regarding most integrated residential settings and alternative settings which can serve the needs of such residents.

76. The Task Force rendered opinions and recommendations based on faulty data.

77. Residents of the State's developmental centers, those recommended for closure and those not recommended for closure, have the right to receive recommendations from their respective treating professionals regarding the most appropriate setting to meet the needs of such residents.

78. The Task Force's mandate to close two developmental centers without meaningful evaluation of the residents' needs further evidences that the residents of the developmental centers have not received treating professionals' recommendations without unreasonable interference or influence from the State's policies, procedures and agendas.

79. Despite the publicly announced targeting for closure of two (2) other Developmental Centers, the inappropriate conduct of the Defendants has continued as to Vineland residents. In fact, it is believed that the Defendants still support policies and practices that encourage the downsizing or closure of all Developmental Centers. Furthermore, there will

be continuing pressure by the Defendants to move residents out of Vineland to make room for residents from North Jersey Developmental Center (hereinafter referred to as “North Jersey”) and Woodbridge Developmental Center (hereinafter referred to as “Woodbridge”), so that the arbitrary and unreasonable closure deadlines can be met.

80. The announced targeting of North Jersey and Woodbridge for closure has not stopped the violation of Plaintiffs rights at Vineland.

81. The Plaintiffs’ causes of action are not based upon, reliant upon, or adversely impacted by any recommendation or finding by the Task Force. The allegedly binding recommendations of the Task Force are merely further evidence of an overall plan to downsize and eventually close all developmental centers in the State of New Jersey.

82. Plaintiffs who have already been discharged from Vineland Developmental Center are being denied access to a similar level of treatment and services they received at the Vineland Developmental Center.

83. Plaintiffs currently residing at Vineland Developmental Center will be denied access to their current high level of treatment and services if the Defendants continue with their current plan to discharge residents.

COMMON ALLEGATIONS OF RIGHTS AND DUTIES.

84. As described more fully herein, each Plaintiff has a constitutional right, a life and liberty interest in, and a statutory entitlement to receive treatment and services from the State of New Jersey in the most appropriate setting for his or her needs.

85. Interpreting the ADA and the Department of Justice’s regulations issued under it, the Supreme Court decision in Olmstead emphasized that there is no “federal requirement that

community-based treatment be imposed on patients who do not desire it.” Olmstead v. Zimring, et al., 527 U.S. 581, 602 (1999). The Olmstead Court further stressed that “nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings.” Id. at 601-02. “[T]he ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk.” Id. at 605.

86. In fact, the Olmstead decision recognized that “for [some] individuals, no placement outside the institution may ever be appropriate.” Id. (citing and quoting Brief for American Psychiatric Association et al. as *Amici Curiae* at 22-23 (“Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times—perhaps in the short run, perhaps in the long run—for the risks and exposure of the less protective environment of community settings”); Brief for Voice of the Retarded et al. as *Amici Curiae* at 11 (“Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution”); Youngberg v. Romeo, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) (“For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know”).

87. By virtue of the ADA and the Olmstead decision, Plaintiffs have a federally-protected right to receive recommendations from treating professionals as to whether community placement is the most appropriate to their needs and to fair consideration of their opposition to that transfer, even if the proposed transfer is from institutional care to an allegedly less restrictive setting. The only proper mechanism for second-guessing an individual or guardian’s decision to

oppose a treating professional's recommended transfer to a less restrictive setting is through State law and State Court Rules. See N.J. Stat. Ann. §§ 3B:12-1 et seq.; N.J. Court Rule 4:86.

88. The paradigm created by the Olmstead decision dictates that residents of the Vineland Development Center and their guardians have the benefit of treating professionals' judgments regarding the most appropriate place to receive services. Only after they have the benefit of that information are residents and guardians required to oppose or consent to continued residence at the facility or discharge to an alternative setting.

89. The Defendants have ignored and will continue to ignore Plaintiffs' right to have treating professionals render full and fair judgments as to where Plaintiffs' should receive services most appropriate to their needs.

90. Likewise, Defendants have ignored and will continue to ignore Plaintiffs' rights, as recognized by Olmstead, to oppose discharge from Vineland.

91. Pursuant to 42 U.S.C. § 12134, Defendants are under a constitutional and statutory duty to:

- (a) effectuate the placement of Plaintiffs in the "most integrated setting appropriate to the needs of qualified individuals with disabilities," a setting that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." (28 C.F.R. pt. 35 app. A.);
- (b) not place Plaintiffs in more restrictive or dangerous placements than they currently enjoy;
- (c) effectuate appropriate institutional placement for each Plaintiff;

- (d) propose an ICF/IID-certified institutional discharge appropriate for the Plaintiffs only where medically and therapeutically appropriate upon an impartial multidisciplinary evaluation;
- (e) ensure that Plaintiffs, Plaintiffs' guardians and/or Plaintiffs' families understand their right to receive treatment and care at an ICF/IID-certified facility prior to seeking consent to discharge a plaintiff from the Center;
- (f) obtain the input and informed consent of Plaintiffs, Plaintiffs' guardians and/or Plaintiffs' families for such transfers.

FIRST CAUSE OF ACTION

AMERICANS WITH DISABILITIES ACT VIOLATIONS

92. Plaintiffs' incorporate paragraphs one (1) through ninety (91) herein by reference as though fully set forth.

93. Because discharges or transfers are being forced on Plaintiffs without their consent, or the consent of their guardians or families, and without appropriate recommendations from treating professionals, such discharges or transfers violate the Americans with Disabilities Act and the Rehabilitation Act. 42 U.S.C. §§ 12131 – 12134.

94. The Plaintiffs are entitled to injunctive and declaratory relief that the Defendants shall not discharge or transfer them from their current residences without meeting the requirements that:

- (a) such discharge or transfer will not result in Plaintiffs receiving treatment and services in a setting more restrictive of their rights than their current residence;
- (b) such discharge or transfer will not be recommended by treating professionals unless the treating professionals independently conclude that such a placement is in the best interests of each Plaintiff and is the most appropriate setting to meet their needs; and
- (c) the Plaintiffs by their guardians or families wish to effect such discharge or transfer.

95. Plaintiffs are entitled to the following additional declaratory and injunctive relief:

- (a) directing Defendants to abide by treatment plans independently prepared by Plaintiffs' respective treating professionals, without regard for the Defendants' mandate to downsize or close any developmental centers, and documented in their respective multidisciplinary evaluations (known as Individual Habilitation Plans at the Vineland Developmental Center).
- (b) Permitting each Plaintiff to choose:
 - (i) to accept or reject the recommendation of the multidisciplinary evaluation; and
 - (ii) to receive treatment in accordance with the independent recommendations of the multidisciplinary evaluation, either at the Vineland Developmental Center, another state operated ICF/IID facility, or non-ICF/IID certified setting, as the plaintiff deems appropriate.

SECOND CAUSE OF ACTION

REHABILITATION ACT VIOLATIONS

96. Plaintiffs' incorporate paragraphs one (1) through ninety-four (95) herein by reference as though fully set forth.

97. Section 504 of the Rehabilitation Act states that “[n]o otherwise qualified person with disabilities shall, solely by reason of his or her disability, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 29 U.S.C. § 794(a).

98. Each named Plaintiff and class member is a “qualified person with disabilities” within the meaning of Section 504, because they (1) have physical and/or mental impairments that substantially limit one or more major life activities; and (2) meet the essential eligibility requirements for long term care under New Jersey’s Medicaid program and are thus “qualified.”

99. Regulations implementing Section 504 require that a public entity administer its services, programs and activities in “the most integrated setting appropriate” to the needs of qualified individuals with disabilities. 28 CFR § 41.51(d).

100. Section 504’s regulations prohibit recipients of federal financial assistance from utilizing criteria or methods of administration:

- (a) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap [or]
- (b) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient’s program with respect to handicapped persons.

101. Defendants have required that Plaintiffs be discharged or transferred from Vineland Developmental Center to other settings in violation of Section 504's integration mandate.

102. Further, Defendants have utilized criteria and methods of administration that subject Plaintiffs and class members to discrimination on the basis of disability, by (1) failing to assess properly the services and supports that would enable Plaintiffs to receive services and treatment in the most appropriate settings for their needs, (2) failing to develop proper individualized transition plans, (3) failing to allow guardians to be a part of the planning process, (4) failing to inform Plaintiffs of all of their options for receiving services, and (5) allocating resources for non-ICF/IID care contrary to the desires and needs of people with disabilities.

103. The Plaintiffs are entitled to injunctive and declaratory relief that the Defendants shall not discharge or transfer them from their current residences without meeting the requirements that:

- (a) such discharge or transfer will not result in Plaintiffs receiving treatment and services in a setting more restrictive of their rights than their current placement;
- (b) such discharge or transfer will not be recommended by treating professionals unless the treating professionals conclude that such a placement is in the best interests of the individual Plaintiffs and is most appropriate to meet their needs; and
- (c) the Plaintiffs by their guardians or families wish to effect such discharge or transfer.

104. Plaintiffs are entitled to the following additional declaratory and injunctive relief:

- (a) directing Defendants to abide by treatment plans independently prepared by Plaintiffs' respective treating professionals, without regard for the Defendants' mandate to downsize or close any Developmental Centers, and documented in their respective multidisciplinary evaluations (known as Individual Habilitation Plans at the Vineland Developmental Center).
- (b) Permitting each Plaintiff to choose:
 - (i) to accept or reject the recommendation of the multidisciplinary evaluation; and
 - (ii) to receive treatment in accordance with the independent recommendations of the multidisciplinary evaluation, either at the Vineland Developmental Center, another state-operated ICF/IID facility, or non-ICF/IID certified setting, as the Plaintiff deems appropriate.

THIRD CAUSE OF ACTION

MEDICAID ACT VIOLATIONS

105. Plaintiffs' incorporate paragraphs one (1) through one hundred three (104) herein by reference as though fully set forth.

106. The State of New Jersey has voluntarily assumed certain obligations under federal law in return for federal funding under the Medical Assistance Program authorized by 42 U.S.C. § 1396, et seq.

107. Those obligations include:

- (a) choice of an ICF/IID institutional placement, subject to a hearing, under 42 U.S.C. § 1396n and 42 CFR § 441.302(d);
- (b) provision of ICF/IID services under 42 U.S.C. §§ 1396a(a)(10) and 1396d(a)(15);
- (c) competent evaluation for placement in an institutional ICF/IID facility under 42 CFR § 483.440(b)(3);
- (d) a continuous active treatment program as defined in 42 CFR § 483.440(a)(1).

108. All Plaintiffs receive assistance under the Medical Assistance Program and are owed the duties stated in the preceding paragraph.

109. Defendants have an obligation to ensure that Plaintiffs' needs and preferences are being met in their multidisciplinary plan.

110. Defendants have failed to ensure that Plaintiffs' needs and preferences are being met in their multidisciplinary plan.

111. Defendants are violating their duties to Plaintiffs under the Medical Assistance Program by their acts and omissions alleged above.

112. Plaintiffs are entitled to declaratory and injunctive relief as to the following:

- (a) such discharge or transfer will not result in Plaintiffs receiving treatment and services in a setting more restrictive of their rights than their current placement;
- (b) such discharge or transfer will not be recommended by treating professionals unless the treating professionals conclude that such a

placement is in the best interests of the individual Plaintiffs and most appropriate to meet their needs; and

- (c) the Plaintiffs by their guardians or families wish to effect such discharge or transfer.

113. Plaintiffs are entitled to the following additional declaratory and injunctive relief:

- (a) directing Defendants to abide by treatment plans independently prepared by Plaintiffs' respective treating professionals, without regard for the Defendants' mandate to downsize or close any developmental centers, and documented in their respective multidisciplinary evaluations (known as Individual Habilitation Plans at the Vineland Developmental Center).
- (b) Permitting each Plaintiff to choose:
 - (i) to accept or reject the recommendation of the multidisciplinary evaluation; and
 - (ii) to receive treatment in accordance with the independent recommendations of the multidisciplinary evaluation, either at the Vineland Developmental Center, another state operated ICF/IID, or non-ICF/IID certified setting, as the Plaintiff deems appropriate.

FOURTH CAUSE OF ACTION

CONSTITUTIONAL DUE PROCESS VIOLATIONS

114. Plaintiffs' incorporate paragraphs one (1) through one hundred twelve (113) herein by reference as though fully set forth.

115. At all relevant times, Defendants were "persons" under 42 U.S.C. § 1983.

116. At all relevant times, Defendants were acting “under color of state law” under 42 U.S.C. § 1983.

117. At all relevant times, a “special relationship” existed between each of the Plaintiffs and the state and state actors that were responsible for their safety.

118. Defendants, while acting under color of state law, unlawfully, intentionally, unreasonably, maliciously and with deliberate and/or reckless indifference to the Plaintiffs’ substantive due process rights secured to Plaintiffs under the Fourth and/or Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1983 et. seq. and similar provisions of federal, state and/or local law, violated Plaintiffs’ rights as alleged above and as follows.

119. The Plaintiffs have significant mental and behavioral health issues. They are unable to verbally articulate their medical and personal needs. Most of them have very limited mobility, and some have none. They are unable to care for themselves in even the most basic ways. They are at the mercy of the persons who provide them with care. Without the regulatory guarantees provided by an ICF/IID facility, they are defenseless against many forms of abuse and neglect which can lead to their injury or death.

120. Before becoming residents at Vineland, some Plaintiffs were abused and neglected in the same types of “community” settings Defendants intend to force Plaintiffs into now.

121. Defendants know or should know that placing the Plaintiffs in other settings, including non-ICF/IID settings will substantially increase their likelihood of injury and death from abuse, neglect, error, lack of appropriate services, and other causes.

122. Defendants' failure to provide adequate safeguards to prevent such harm is a violation of Plaintiffs' constitutional right not to be deprived of life or liberty without due process of law.

123. The actions of the Defendants herein have significantly contributed to and increased the vulnerability of the Plaintiffs and created risks that would not have otherwise existed if Defendants complied with their legal duties.

124. Defendants' actions and inactions constitute a violation of Plaintiffs' federal rights, as protected by the Fourteenth Amendment to the Constitution of the United States and other federal laws. Unless restrained by this Court, Defendants will continue to engage in their misbehavior, which deprives the Plaintiffs of rights, privileges and immunities secured by the Constitution of the United States and federal law, and will cause irreparable harm to these residents.

125. The harm ultimately caused or to be caused to the Plaintiffs was or is foreseeable and sufficiently direct.

126. Plaintiffs are entitled to declaratory and injunctive relief directing that:

- (a) such discharge or transfer will not result in Plaintiffs receiving treatment and services in a setting more restrictive of their rights than their current placement;
- (b) such discharge or transfer will not be recommended by treating professionals unless the treating professionals conclude that such a placement is in the best interests of the individual Plaintiffs; and
- (c) such discharge or transfer will not occur unless the Plaintiffs, by their guardians or families, wish to effect such discharge or transfer.

127. Plaintiffs are entitled to the following additional declaratory and injunctive relief:
- (a) directing Defendants to abide by treatment plans independently prepared by Plaintiffs' respective treating professionals, without regard for the Defendants' mandate to downsize or close any developmental centers, and documented in their respective multidisciplinary evaluations (known as Individual Habilitation Plans at the Vineland Developmental Center).
 - (b) Permitting each Plaintiff to choose:
 - (i) to accept or reject the recommendation of the multidisciplinary evaluation; and
 - (ii) to receive treatment in accordance with the independent recommendations of the multidisciplinary evaluation, either at the Vineland Developmental Center, another state operated ICF/IID facility, or non-ICF/IID certified setting, as the Plaintiff deems appropriate.

CONCLUSION

WHEREFORE Plaintiffs seek:

- (a) Declaratory and injunctive relief as set forth herein.
- (b) An award to Plaintiffs' of reasonable attorneys' fees, litigation expenses, and costs; and
- (c) Any other relief this Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Respectfully submitted,

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Date: January 11, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January 2013, I electronically filed the foregoing with the Clerk of Courts, using the CM/ECF system, which will then send notification of such filing (NEF), to the following:

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